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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIFTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and Respondent,

v.

MIGUEL ANGEL QUINTERO,

Defendant and Appellant.

F069749

(Tulare Super. Ct.
No. VCF255016C)

OPINION

APPEAL from a judgment of the Superior Court of Tulare County. Valeriano Saucedo, Judge.

Patricia L. Brisbois, under appointment by the Court of Appeal, for Defendant and Appellant.

Kamala D. Harris, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Michael P. Farrell, Assistant Attorney General, Eric L. Christoffersen and Robert C. Nash, Deputy Attorneys General, for Plaintiff and Respondent.

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Defendant was the getaway driver for a robbery at an ATM. Defendant's cousin and his cousin's friend, both gang members, robbed the victim as defendant waited in a vehicle nearby. During the robbery, defendant's cousin shot the victim.

Defendant challenges the imposition of gun and gang enhancements because there was insufficient evidence he knew the two principals were gang members. Defendant also contests the imposition of concurrent sentences for robbery and attempted murder. He contends that the robbery sentence should have been stayed pursuant to Penal Code section 654.¹ We agree with both contentions. We reverse the gang enhancement, order the sentence on count 3 stayed under section 654 and order correction of several conceded errors in the abstract of judgment. We affirm the remainder of the judgment.

BACKGROUND

Defendant Miguel Angel Quintero and two codefendants, Jesus Castillo and Roberto Estrada, were charged with several crimes in connection with a robbery and shooting at an ATM. The information charged defendant with attempted murder (count 1; §§ 664, 187, subd. (a)), carjacking (count 2; § 215, subd. (a)), first degree robbery (count 3; § 211),² assault with a firearm (count 4; § 245, subd. (a)(2)), and assault with a deadly weapon (i.e., a knife) (count 5; § 245, subd. (a)(1)).³ The information also alleged that all five crimes were committed for the benefit of, at the direction of, and in association with a criminal street gang (§ 186.22, subd. (b)(1)(A)– (C)). Finally, the information alleged that with respect to counts 1, 2, and 3, a principal (i.e., Jesus Castillo)

¹ All further statutory references are to the Penal Code unless otherwise stated.

² See also section 212.5, subdivision (b).

³ A sixth count charged Roberto Estrada with evasion of an officer. (Veh. Code, § 2800.2, subd. (a).)

intentionally discharged a firearm proximately causing great bodily injury⁴ to the victim, Jeffrey Gould (referred to in the complaint as “J.G.”)⁵ (§ 12022.53, subds. (c)–(e)(1).)

Defendant was tried separately from his two codefendants. The jury convicted defendant of attempted murder, first-degree robbery, assault with a firearm, and assault with a deadly weapon; and found the related enhancements to be true. The jury acquitted defendant of carjacking.

On count 1, defendant was sentenced to life with the possibility of parole, plus 25 years to life (§ 12022.53, subd. (d)). On count 3, defendant was sentenced to a concurrent term of four years, plus 25 years to life (§ 12022.53, subd. (d)). On count 4, defendant was sentenced to a term of three years, plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C).). On count 5, defendant was sentenced to a term of three years, plus 10 years for the gang enhancement (§ 186.22, subd. (b)(1)(C).) Defendant’s sentences on counts 4 and 5 were stayed pursuant to section 654. Restitution and several other fines and fees were also imposed.

Defendant appeals.

FACTS

I. Events of July 12, 2011

Jeffrey Gould’s Testimony

At about 5:00 a.m., on July 12, 2011, Jeffrey Gould (Gould) pulled up to an ATM in Exeter. He exited his Mazda and approached the ATM, having left the car running and its door open. He withdrew \$700 for rent. Gould’s mother, with whom he lived, called and told him to withdraw another \$220. However, the ATM indicated the account had insufficient funds for the additional \$220.

⁴ The information says “great bodily injury and death.”

⁵ Several additional enhancements were alleged with respect to the other defendants.

There was an older man behind him, so Gould let him use the ATM. As the man used the ATM, Gould went to his car and continued to speak with his mother on the phone. After the man was done using the ATM, Gould again attempted to withdraw additional funds but could not due to insufficient funds. The ATM printed a receipt, which fell to the ground. Gould picked it up and looked at it. That is when two men came up to him. One of the men was wearing a hat and holding a knife with a blade about four inches in length. The knife-wielding assailant said, “ ‘Give me your shit, Holmes.’ ” Gould replied, “ ‘F**k you.’ ” The knife-wielding assailant then hit Gould with his hand. The two “scuffled around” until the other assailant shot Gould. The bullet broke two of Gould’s ribs, injured his lung and necessitated removal of his spleen.

Raul Pablo’s Testimony

In the early morning of July 12, 2011, Raul Pablo was working as a gardener in the parking lot of the Bank of Sierra in Exeter. When Pablo had started working, a dark Trailblazer parked behind his vehicle. Two young men exited the Trailblazer and headed towards the bank. Pablo watched them to ensure they were not going to steal anything from the trailer attached to his vehicle. Pablo testified, “I didn’t pay too much attention, but I was watching them.” Then Pablo heard a gunshot. After the gunshot, the Trailblazer left the parking lot. One of the young men Pablo had observed earlier entered a white car near the ATM and left.

Detective⁶ Ashley Salinas’s Testimony

On July 12, 2011, at about 5:15 a.m., Exeter Police Officer Ashley Salinas received a call for a robbery at Bank of the Sierra in Exeter. When Salinas responded to the scene, she observed a male sitting on the ground with \$20 bills scattered on the ground next to him. Salinas recovered a nine-millimeter shell casing at the scene. The

⁶ By the time of trial in 2014, Salinas had been a detective for two years. At the time of the incident, Salinas was a patrol officer.

victim informed her that the suspects had taken his car. Another officer testified that the vehicle was found unoccupied a “few blocks” away. The keys were still in the ignition and the vehicle was still running.

II. Investigation

Officer⁷ Daniel Green’s Testimony

Detective Daniel Green was the police department’s lead investigator on the case. Green interviewed the victim, Gould, who identified the shooter as Jesus Castillo.

On July 12, 2011, Detective Green went to a house on West Willow in Exeter. Green observed a black Trailblazer in the driveway of the residence. A records search indicated that the Quintero family lived at the residence. Defendant Miguel Angel Quintero also confirmed to Green that he lived there.

On the evening of July 13, 2011, Detective Green executed a search warrant on the house. In the house, Green found a nine-millimeter semiautomatic handgun, live nine-millimeter ammunition, a cleaning rag, solvent, a Los Angeles Dodgers jersey, and a hat.⁸ Green testified the rag appeared to have been used to clean the firearm. The nine-millimeter round found at defendant’s residence matched the make of the round recovered at the crime scene.

Defendant’s Interview

After searching the house, Detective Green interviewed defendant at approximately 1:30 a.m. The interview was played for the jury.

⁷ At the time of the incident, Daniel Green was a detective with the Exeter Police Department. He is currently an officer.

⁸ The gun was found in the room of defendant’s younger brother. The Los Angeles Dodgers jersey was found in defendant’s room.

Defendant initially said that late Monday⁹ night he drove with his girlfriend to her dad's house, stayed for "at least about an hour," then "came straight back" and went to sleep. Detective Green told defendant he had video surveillance of all the people involved in "the thing that happened at the bank yesterday." Defendant admitted that his cousin Jesus Castillo and his friend "Huesitos"¹⁰ were also in the car with him. They had gone to get food in Visalia. Castillo and Huesitos saw someone using the ATM and told defendant to turn around. Defendant dropped off Castillo and Huesitos at the bank parking lot near 5:00 a.m. Castillo and Huesitos got out and were running "kind of towards the bank." Defendant knew Castillo and Huesitos were going to rob someone, but did not know they would shoot anyone.

Defendant waited down the road. When Castillo and Huesitos returned, they said they had shot the victim because he was bigger than they were, and he was "coming at them." Defendant said they had not initially planned to take the victim's car but it "just happened." They thought, "[T]he car's right there, it's on. I mean I guess since it's on ... they [Castillo and Huesitos] just seen [*sic*] it and jumped on."

The next day Castillo and Huesitos put gas in defendant's car and bought him fast food.

Detective Green showed defendant several still photos from the ATM footage. Green asked defendant who was wearing a backwards hat in the photos. Defendant initially said it was his cousin, then said it was Huesitos a.k.a. "Robert."

Detective Esteban Soliz's Testimony

Los Angeles County Sheriff's Detective Esteban Soliz testified as a gang expert for the prosecution. Soliz primarily investigates gangs in Artesia and Hawaiian Garden.

⁹ Defendant's interview took place on Thursday July 14, 2011. The preceding Monday would have been July 11, 2011.

¹⁰ "Huesitos" translates to "Bones." "Bones" is the gang moniker for Roberto Estrada.

Hawaiian Garden is a small city in southeast Los Angeles county. It is home to the Hawaiian Garden gang, which also goes by the names “Varrio Hawaiian Garden,” “Varrio Hawaiian Garden Rifa,” and “the Gardens.” The gang has had 1,200 documented members “through the years.”

The gang’s symbols are palm trees and “Punchie,” the Hawaiian Punch character. They also use the letters “H” and “G.” When Hawaiian Garden gang members use graffiti, they often tag the letters “VHGR,” “VHG,” and “X” to signify the number 10. They will also tag the number “13.” Detective Soliz testified that the Hawaiian Garden gang commits assaults, narcotic sales, vehicle burglaries, and robberies.

Detective Soliz testified that a “moniker” is a nickname given to a gang member. A moniker is given when an individual is jumped into the gang or becomes associated with it. Soliz testified that Jesus Castillo’s moniker is “Chewy” and Roberto Estrada’s monikers are “Bones” and “Mano.”

Based on his background investigation, Detective Soliz knew that Castillo and Estrada have tattoos. On his cheeks, Castillo has tattoos reading “H” and “G” for “Hawaiian Garden.” On his hand, Castillo has a tattoo reading “BGHR” which refers to “Barrio Hawaiian Garden Rifa” and a “13.” On his stomach, Castillo has a tattoo reading “HG” referring to Hawaiian Garden. Castillo had several other tattoos which, alone, do not confirm gang membership.

Estrada has a pair of lips tattooed on his neck. Such a tattoo, when viewed sideways, can depict the number “13.” Estrada has a tattoo reading “HG” on his torso. On his back, Estrada has a tattoo that reads “Hawaiian Garden” and another that depicts “Punchie.” The Punchie character has a “G” on its crown, similar to the Green Bay Packers insignia which is meant to represent “the Gardens.”

Detective Soliz testified that gang members do not usually commit crimes with people with whom they are unfamiliar. They have to know they can trust the person to keep their “mouth shut.”

Detective Soliz opined that Castillo is a member of the Varrio Hawaiian Garden gang with the moniker of “Chewy.” Soliz’s opinion was based on Castillo’s tattoos and self-admission. Soliz also opined that Estrada is a member of the Varrio Hawaiian Garden gang with the moniker “Mano” or “Bones.” Soliz’s opinion was based on Estrada’s self-admission and on crime reports. Soliz did not offer an opinion that defendant was a gang member.¹¹

Another police officer testified that on June 12, 2011, he took photographs of several graffiti markings near a mini-mart in Exeter. Detective Soliz testified that one of the graffiti markings read, “HG 13” which means “Hawaiian Garden 13” representing the Mexican Mafia. Below the “HG 13” appears the text “Grim-Bones,” which represents the monikers of the two gang members involved in tagging the graffiti. Specifically, it indicates that Grim was the “author” and Bones was in attendance when the tagging occurred. Another photograph showed a separate graffiti tag, which included the number “13” and the acronyms “VHGR” and “SELA.” “VHGR” refers to “Varrio Hawaiian Garden Rifa” and “SELA” stands for “Southeast LA.” Another photograph showed a graffiti tag reading “LA” with three dots nearby. Another photograph showed a fourth graffiti tag on a trash can reading “HG” which stands for “Hawaiian Garden.”

Detective Soliz testified that graffiti “serves as a fear factor.” “It shows if you’re within that neighborhood, that the gang is rolling around at all times of the night and all times of the day. They control that area.” Soliz indicated it was very significant that this graffiti appeared in Tulare County because the area is controlled by Norteños, not southsiders.

Detective Soliz was told to “[a]ssume, hypothetically, we have an incident that takes place where a month after the Hawaiian Garden graffiti is seen in Exeter,

¹¹ The Attorney general concedes “there was no evidence that [defendant] was a gang member”

California, you have two Varrio Hawaiian Garden gang members go to an ATM in Exeter, about five o'clock in the morning, one's armed with a knife, wearing a Dodgers shirt, or a shirt that says 'Los Angeles,' and one is armed with a handgun, one with the knife demands money from somebody at the ATM. That person refuses to give it and the gang member with the gun shoots the person, they grab the money, and flee in the car of the person they robbed." Soliz was asked if that incident would "promote, benefit the gang in any way?" Soliz responded that "[i]t would, but there would be [] more information [needed]." The prosecutor asked what additional information would be needed, and Soliz responded, "Was there any gang slang thrown out? There's a possibility that there are gang members up here, but whether they're the same individuals that committed the crime. [¶] The Los Angeles shirt, it's just a basic insignia. The person that may be caught, if they were documented members, yes, you can see that's a gang-related crime." Soliz testified that if the two people committing the robbery were Hawaiian Garden gang members, then the crime would be "gang-related." The crime would increase the gang members' status. Moreover, it would show other gangs that the Hawaiian Garden gang was present in the neighborhood and other gangs should "watch out."

Detective Soliz testified that gang members need to trust the people with whom they commit crimes. For example, if you have a getaway driver, you need to be confident they will not "take off and leave you hanging...."

Detective Soliz also testified as to several predicate offenses of the Hawaiian Garden gang.

Argument on the Gang Enhancement

The prosecutor discussed the gang enhancement in closing argument, saying: "What you did not hear for evidence, you did not hear Detective Soliz say this person [i.e., defendant] was a gang member. He doesn't have to. He's just committing this crime in association. He's meeting two of these things – in association with the other gang

members, the gang members, and he's also doing it for the benefit of that gang, that criminal street gang."

Defense counsel argued defendant is "not a gang member."

In rebuttal argument, the prosecutor said, "It's also true that Detective Soliz talked about Hawaiian Garden gang members don't do crimes with people they don't trust. That's why this is in association with a criminal street gang."

DISCUSSION

I. Substantial Evidence

Defendant contends there was "no evidence" offered to show he knew Castillo or Estrada were gang members. As a result, he contends the gang enhancement (§ 186.22, subd. (b)(1)) and gun use enhancement (§ 12022.53, subd. (e)(1)) must be reversed. We find this to be a close issue, but ultimately agree that there is insufficient evidence defendant knew Castillo and Estrada were gang members.

"In considering a challenge to the sufficiency of the evidence to support an enhancement, we review the entire record in the light most favorable to the judgment to determine whether it contains substantial evidence – that is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citation.] We presume every fact in support of the judgment the trier of fact could have reasonably deduced from the evidence. [Citation.] If the circumstances reasonably justify the trier of fact's findings, reversal of the judgment is not warranted simply because the circumstances might also reasonably be reconciled with a contrary finding. [Citation.] 'A reviewing court neither reweighs evidence nor reevaluates a witness's credibility.' [Citation.]" (*People v. Albillar* (2010) 51 Cal.4th 47, 59–60 (*Albillar*)).

To establish the requisite intent under the gang enhancement, the prosecution must prove the defendant specifically intended "to promote, further, or assist in any criminal conduct by gang members...." (§ 186.22, subd. (b)(1).) Such intent can be inferred when there is evidence "defendant intended to and did commit the charged felony with *known* members of a gang" (*Albillar, supra*, 51 Cal.4th at p. 68, italics added.) But

that rule only applies when the co-participants are *known* members of a gang. (See *People v. Ramirez* (2016) 244 Cal.App.4th 800, 819.) Defendant argues there was insufficient evidence that he knew Castillo and Estrada were gang members.

In response, the Attorney General argues there was evidence of the following: (1) Castillo and Estrada had been with defendant for about a week, during which time defendant would have seen their tattoos; (2) defendant referred to Estrada as Huesitos which translates to his gang moniker “Bones”; (3) defendant told police that Castillo had the gun “most of the time”; and (4) Estrada had a Los Angeles Dodgers jersey. From the totality of the circumstances presented by these facts, the argument goes, the jury could have reasonably inferred defendant knew Estrada and Castillo were gang members.

Tattoos

Castillo and Estrada’s tattoos were of certain letters – like “HG” and “BGHR” – and depictions – like a pair of lips or “Punchie.”¹² With the benefit of the gang expert’s testimony, we know that these tattoos reflect membership in the Varrio Hawaiian Garden Rifa gang. But they are not the kind of tattoos a layperson unfamiliar with the Hawaiian Garden gang would recognize as indicating gang membership. Indeed, that’s presumably why a gang expert was asked to explain the significance of the tattoos to the jury. “[T]he culture and habits of criminal street gangs are not matters within common knowledge ... and [we] have therefore approved expert testimony to describe the significance of graffiti and hand signs.” (*People v. Ochoa* (2001) 26 Cal.4th 398, 438, citations omitted, abrogated on another point in *People v. Prieto* (2003) 30 Cal.4th 226, 263, fn. 14.)

¹² Estrada also had tattoos of the “Punchie” character and the words “Hawaiian Gardens” on his back. Based on the photographic exhibit, it appears these tattoos would not be visible while Estrada was clothed.

Moreover, there was no evidence defendant was a gang member or any specific evidence defendant had any other reason to be familiar with Hawaiian Garden gang tattoos.¹³

In sum, for Castillo and Estrada's tattoos to have raised an inference that *defendant* knew they were gang members, there needed to have been evidence that either (1) the tattoos were such that a layperson would recognize they indicate gang membership, or (2) that defendant was not a "layperson" but instead had sufficient familiarity with the Hawaiian Garden gang to know that tattoos like "HG," "BGHR" or Punchie indicate gang membership. No such evidence was adduced here.

Moniker

Similarly, the fact that defendant referred to Estrada as "Huesitos" does not indicate he knew Estrada was a gang member. There is no indication defendant knew the nickname had gang origins or connotation.

Gun

The Attorney General notes that defendant said Castillo had the gun "most of the time" and claimed not to know the gun was in his brother's room, "indicating the last place he had seen it was with his cousin." But the Attorney General does not explain how this evidence indicates defendant knew Castillo was a gang member.

¹³ At the preliminary hearing, Judge Gary Paden declined to hold defendant to answer on the gang allegations. The following exchange ensued between the court and the prosecutor at prelim:

"THE COURT: There was no evidence he knew they were gang members.

"[PROSECUTOR:] They have the 'HG' tattooed on their face.

"THE COURT: It means nothing to me. It could mean nothing to him.

"[PROSECUTOR:] They're cousins.

"THE COURT: Well, I'm not going to hold Quintero on any gang allegations...."

The prosecutor refiled the gang allegations against Quintero days later.

Los Angeles Dodgers Jersey

Finally, the fact that Estrada had a Los Angeles Dodgers jersey does not sufficiently support the conclusion defendant knew Estrada was a gang member. Sports-related clothing is simply too common to constitute substantial evidence defendant knew Estrada was a gang member. Even the prosecution's gang expert hinted at this common-sense observation. Detective Soliz was told to "[a]ssume, hypothetically, we have an incident that takes place where a month after the Hawaiian Garden graffiti is seen in Exeter, California, you have two Varrio Hawaiian Garden gang members go to an ATM in Exeter, about five o'clock in the morning, one's armed with a knife, wearing a Dodgers shirt, or a shirt that says 'Los Angeles,' and one is armed with a handgun, one with the knife demands money from somebody at the ATM. That person refuses to give it and the gang member with the gun shoots the person, they grab the money, and flee in the car of the person they robbed." Soliz was asked if that incident would "promote, benefit the gang in any way?" Soliz responded that "[i]t would, but there would be [] more information [needed]." The prosecutor asked what additional information would be needed, and Soliz responded, "Was there any gang slang thrown out? There's a possibility that there are gang members up here, but whether they're the same individuals that committed the crime. [¶] *The Los Angeles shirt, it's just a basic insignia.* The person that may be caught, *if they were documented members*, yes, you can see that's a gang-related crime." (Italics added.)

Conclusion

We are not certain Quintero was unaware Castillo and Estrada were gang members. Indeed, from the evidence identified by the Attorney General, one could easily speculate that Quintero would have known Castillo and Estrada were gang members. But, under the substantial evidence test, "it is not enough for the respondent simply to point to 'some' evidence supporting the finding" (*People v. Dominguez* (2006) 39 Cal.4th 1141, 1153.) "[W]e must judge whether the evidence of each of the essential

elements ... is *substantial*” (*Ibid.*, original italics.) “[T]hat is, evidence that is reasonable, credible, and of solid value – from which a reasonable trier of fact could find the defendant guilty beyond a reasonable doubt. [Citations.]” (*People v. Salazar* (2016) 63 Cal.4th 214, 242.) We conclude the quantum of evidence offered at trial here is not legally sufficient to support the gang enhancements.

II. Execution of the Sentence on Count 3 Must be Stayed

Defendant contends the court erred by failing to stay punishment of count 3 (first-degree robbery) pursuant to section 654. We agree.

Waiver

The Attorney General briefly argues that defendant did not preserve his section 654 objection because he did not object at sentencing. We do not find forfeiture. “Ordinarily, a section 654 claim is not waived by failing to object below. ‘[T]he waiver doctrine does not apply to questions involving the applicability of section 654. Errors in the applicability of section 654 are corrected on appeal regardless of whether the point was raised by objection in the trial court or assigned as error on appeal.’ [Citation.]” (*People v. Hester* (2000) 22 Cal.4th 290, 295.)

We will now proceed to the merits of defendant’s section 654 claim.

Natural and Probable Consequences Doctrine

“ ‘[A] person who aids and abets a crime is guilty of that crime even if someone else committed some or all of the criminal acts.’ [Citation.]” (*People v. Maciel* (2013) 57 Cal.4th 482, 518.) And “under the natural and probable consequences doctrine, an aider and abettor is guilty not only of the intended crime, but also “for any offense that was a ‘natural and probable consequence’ of the crime aided and abetted.” ’ [Citation.]” (*People v. Chiu* (2014) 59 Cal.4th 155, 158.) Thus, under the natural and probable causes doctrine, an aider and abettor may be liable for a crime he did not intend to happen. (*People v. Croy* (1985) 41 Cal.3d 1, 12, fn. 5.)

Single Objective Test Under Section 654

Section 654 provides that “[a]n act or omission that is punishable in different ways by different provisions of law shall be punished under the provision that provides for the longest potential term of imprisonment, but in no case shall the act or omission be punished under more than one provision....” (§ 654, subd. (a).)

Plainly stated, section 654 “ ‘prohibits multiple punishment for the same “act or omission.” ’ ” (*People v. Correa* (2012) 54 Cal.4th 331, 337.) For example, if a convicted felon commits the single act of possessing a concealed weapon, he cannot be punished for both possession of a firearm by a felon and possession of a concealed weapon. (See generally *People v. Jones* (2012) 54 Cal.4th 350.)

“ ‘Although [section 654] “literally applies only where ... punishment arises out of multiple statutory violations produced by the ‘same act or omission,’ ” [the Supreme Court has] extended its protection “to cases in which there are several offenses committed during ‘a course of conduct deemed to be indivisible in time.’ [Citation.]” [Citation.]’ [Citation.]” (*People v. Ramirez* (2006) 39 Cal.4th 398, 478.) “ ‘ “ ‘Whether a course of criminal conduct is divisible and therefore gives rise to more than one act within the meaning of section 654 depends on the intent and objective of the actor. If all of the offenses were incident to one objective, the defendant may be punished for any one of such offenses but not for more than one.’ ” ’ [Citation.]” (*People v. Jackson* (2016) 1 Cal.5th 269, 459.)

Synthesis

When a defendant aids and abets an intended offense and, as a result, becomes liable for an unintended offense, he or she has acted, by definition, in pursuit of a single objective: the commission of the intended offense. (See *People v. Bradley* (2003) 111 Cal.App.4th 765, 768–772.) Here, defendant was convicted of attempted murder and robbery on the theory he knew the robbery would happen and that the attempted murder

was a natural and probable consequence of the robbery.¹⁴ Defendant was *not* tried on the theory that he *intended* for the attempted murder to occur. Indeed, the prosecutor made clear that the natural and probable consequences doctrine was the *only* theory of guilt as to the attempted murder (and other crimes). During closing, the prosecutor argued, “What does it take to be an aider and abettor? First off, you’ve got to find someone committed a crime. Everything flows from the robbery. [¶] The judge read you the instructions. If for some reason there was no robbery, the defendant would be guilty of nothing....” In other words, the prosecutor was foreclosing the theory that defendant *intended* to aid and abet the attempted murder directly and could therefore be guilty apart from the natural and probable consequences doctrine.

Nonetheless, the Attorney General contends there was evidence defendant *did* intend to aid and abet the shooting of the victim.

The Attorney General points to the following exchange during defendant’s interview with police:

“[Officer:] So did they [i.e., Castillo and Estrada] ... did they tell you where to park and everything or did you...

“[Defendant:] No.

“[Officer:] ...do that yourself?

¹⁴ It was clear that the sole theory of defendant’s guilt for the attempted murder was that it was a natural and probable consequence of the robbery.

In closing argument, the prosecutor said, “Now, you may be wondering if this defendant only dropped people off to rob someone, why is there an attempted murder charge? [¶] The reason there’s an attempted murder charge is because the attempted murder is a natural and probable consequence of the robbery....” Earlier in closing, the prosecutor had argued, “What does it take to be an aider and abettor? First off, you’ve got to find someone committed a crime. Everything flows from the robbery. [¶] The judge read you the instructions. If for some reason there was no robbery, the defendant would be guilty of nothing....”

“[Defendant:] No, I did it myself, like I was actually just ... I was thinking about just kind of staying somewhere right there so they *wouldn’t*...

“[Officer:] Yeah.

“[Defendant:] ...actually ... if they had a gun...

“[Officer:] Right.

“[Defendant:] ...like for them *not to* shoot or even if they didn’t have a gun for them *not to*, you know, do some damage to the guy.” (Italics added.)

These statements do not, as the Attorney General claims, indicate that defendant intended for Castillo and/or Estrada to attempt to murder the robbery victim. To the contrary, defendant was claiming he remained parked so Castillo and Estrada would *not* “shoot” or “do damage” to the victim. These statements simply do not support an inference that attempted murder was one of defendant’s objectives.

The Attorney General also points to defendant’s statement to police regarding the gun found in his home. In reference to that gun, defendant said Castillo “had it most of the time.” But defendant also said he did not know Castillo or Estrada had a gun *during the robbery*. Defendant *knowing* that Castillo had a gun most of the time is not the same as *intending* for Castillo to use it in a particular instance.

In sum, the Attorney General fails to identify sufficient evidence that defendant had any objectives that were not incidental to the robbery. Consequently, section 654, as interpreted by the Supreme Court, requires a stay of execution of sentence on count 3.

III. Corrections to the Abstract of Judgment

Both parties agree the abstract of judgment needs to be corrected in two respects: (1) the notations indicating that defendant was convicted by “plea” should be corrected to reflect defendant was convicted by a jury; and (2) the abstract fails to show that the

sentence on count four was stayed pursuant to section 654.¹⁵ We direct that these errors not be repeated when the new abstract of judgment is created.

DISPOSITION

The true findings on the section 186.22, subdivision (b) enhancements and section 12022.53, subdivision (e)(1) enhancements are reversed. The matter is remanded to the trial court for resentencing with directions to stay execution of the sentence on count 3 pursuant to section 654. When a new abstract of judgment is prepared after resentencing, it shall note that defendant was convicted by “jury” not by “plea.” The new abstract of judgment shall also reflect that execution of sentence on count 4 was stayed pursuant to section 654. In all other respects the judgment is affirmed.

POOCHIGIAN, Acting P.J.

WE CONCUR:

PEÑA, J.

BRIAN L. MCCABE, J.*

¹⁵ The parties disagree on a third issue concerning the abstract of judgment regarding the gun enhancement to count 3. Because we reverse the true finding on that enhancement, the issue is moot.

* Judge of the Merced Superior Court, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.